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TORTS: COVID-19 Pandemic Business Safety Act & Executive Order by the Governor Designating Auxiliary Management Workers and Emergency Management Activities

Angelena Velaj

Georgia State University College of Law, avelaj1@student.gsu.edu

Troy Viger

Georgia State University College of Law, tviger1@student.gsu.edu

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TORTS

COVID-19 Pandemic Business Safety Act: Amend Title 51 of the Official Code of Georgia Annotated, Relating to Torts, so as to Provide for Certain Immunities from Liability Claims Regarding COVID-19 & Executive Order by the Governor Designating Auxiliary Management Workers and Emergency Management Activities

CODE SECTIONS:	O.C.G.A. §§ 31-7-1; 38-3-51; 51-16-1, -2, -3, -4, -5 (new)
BILL NUMBER:	SB 359
ACT NUMBER:	588
GEORGIA LAWS:	2020 Ga. Laws 798
EXECUTIVE ORDER:	Ga. Exec. Order No. 04.14.20.01
EFFECTIVE DATES:	Ga. Exec. Order No. 04.14.20.01, April 14, 2020; O.C.G.A. §§ 51-16-1 to -5, August 5, 2020
SUMMARY:	The Executive Order expanded immunity from liability for volunteer health care workers as emergency management workers performing emergency management activities. The Order was not limited to only COVID-19-related activities. When the legislature reconvened, legislators passed the Georgia COVID-19 Pandemic Business Safety Act, which provided liability limitation to businesses against tort claims arising from the pandemic.

*Introduction**The Origins of the Executive Order*

A newly discovered coronavirus, SARS-CoV-2, caused a global pandemic among humans called COVID-19.¹ COVID-19 is just one of many different types of coronaviruses.² COVID-19 causes respiratory illness and is highly contagious.³ Symptoms of COVID-19 include fever, shortness of breath, cough, aches, sore throat, unexplained loss of taste or smell, diarrhea, and headache.⁴ Currently, there are no treatments or vaccines available for COVID-19.⁵ COVID-19 can be spread by coming into close contact with those infected with the virus, by coming into contact with respiratory droplets of someone who is infected with the virus, and also by touching surfaces that the virus has been on and then touching your nose, eyes, or mouth without proper sanitation.⁶

As of October 10, 2020, more than 37 million people across the globe had tested positive for COVID-19.⁷ COVID-19 had spread to over 235 countries and had killed more than 1 million people.⁸ COVID-19 was first detected in December 2019 in Wuhan, China, when the World Health Organization (WHO) informed the public that Chinese health officials reported dozens of patients were being treated for pneumonia from an unknown source.⁹ On January 11,

1. Lauren M. Sauer, *What Is Coronavirus?*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> [https://perma.cc/8WEG-6AV2] (Aug. 7, 2020).

2. *Id.*

3. *Coronavirus*, WORLD HEALTH ORGANIZATION [WHO], https://www.who.int/health-topics/coronavirus#tab=tab_1 [https://perma.cc/3W7T-659A].

4. Sauer, *supra* note 1.

5. *Coronavirus*, *supra* note 3.

6. *What You Should Know About COVID-19 to Protect Yourself and Others*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/2019-ncov-factsheet.pdf> [https://perma.cc/VR83-JR3E].

7. *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORGANIZATION [WHO], <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> [https://perma.cc/4JTN-PWPX].

8. *Id.*

9. Erin Schumaker, *Timeline: How Coronavirus Got Started*, ABC NEWS, <https://abcnews.go.com/Health/timeline-coronavirus-started/story?id=69435165> [https://perma.cc/2D2F-6VKZ] (July 28, 2020, 12:12 PM).

2020, China reported its first death due to the new virus.¹⁰ Shortly after, the Centers for Disease Control and Prevention (CDC) started to conduct airport screenings at select locations for people traveling into the United States from China, and on January 21, 2020, the first case of COVID-19 was confirmed in the United States.¹¹

On January 30, 2020, the United States reported its first person-to-person transmission of COVID-19.¹² The next day, President Donald Trump (R) declared the COVID-19 outbreak to be a public health emergency in the United States.¹³ On March 1, 2020, the United States reported six cases of the virus, and by April 1, 2020, more than 27,000 people were reported to be infected with COVID-19.¹⁴ As of October 10, 2020, over 7.6 million COVID-19 cases had been reported in the United States, with more than 213,000 deaths.¹⁵

The State of Georgia reported its first COVID-19 case on March 2, 2020, and soon after reported its first death due to COVID-19 on March 12.¹⁶ Georgia, as of October 10, 2020, had confirmed more than 330,000 cases; 7,393 deaths; almost 30,000 hospitalizations; and over 5,500 Intensive Care Unit (ICU) admissions of COVID-19.¹⁷ Hospitals in Georgia had to manage the quick increase of COVID-19 patients, and all hospitals, especially those in rural areas, met challenges along the way that exhausted their resources.¹⁸ For

10. *Id.*

11. Grace Hauck et al., *Five Months in: A Timeline of How COVID-19 Has Unfolded in the US*, USA TODAY, <https://www.usatoday.com/in-depth/news/nation/2020/04/21/coronavirus-updates-how-covid-19-unfolded-u-s-timeline/2990956001/> [<https://perma.cc/AY4A-E2J5>] (June 23, 2020, 6:21 AM).

12. *Id.*

13. David Jackson, *Trump Administration Declares Coronavirus Emergency, Orders First Quarantine in 50 Years*, USA TODAY, <https://www.usatoday.com/story/news/politics/2020/01/31/coronavirus-donald-trump-declares-public-health-emergency/4625299002/> [<https://perma.cc/6UZ3-WNCF>] (Feb. 1, 2020, 7:17 AM).

14. Cases in the U.S. of *Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/QRA2-5JMZ>] (August 9, 2020).

15. United States COVID-19 Cases and Deaths by State of *CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/6XPG-8AMD>].

16. *Georgia Overall COVID-19 Status*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/covid-19-daily-status-report> [<https://perma.cc/A79J-D7L7>].

17. *Georgia Department of Public Health Daily Status Report*, GA. DEP'T OF PUB. HEALTH, <https://dph.georgia.gov/covid-19-daily-status-report> [<https://perma.cc/8PGE-XN83>].

18. Nyamekye Daniel, *Rural Hospitals in Georgia Face Bigger Challenges in COVID-19 Response*,

example, Phoebe Putney Memorial Hospital in Albany, Georgia, ran through six months' worth of supplies in less than a week when it had its first influx of patients come into the hospital.¹⁹

The Speaker of the House of Representatives and the Lieutenant Governor suspended the state legislature on March 13, and the legislature would not reconvene until mid-June.²⁰ Because the legislature suspended the session, Georgia Governor Brian Kemp (R) was empowered to issue Executive Orders to handle the crisis statewide.²¹ Governor Kemp declared a Public Health State of Emergency on March 14 and subsequently issued additional Executive Orders to contain the spread of COVID-19.²² On April 14, Governor Kemp issued the controversial Executive Order 04.14.20.01, Designation of Auxiliary Emergency Management Workers and Emergency Management Activities.²³

CTR. SQUARE (Mar. 19, 2020), https://www.thecentersquare.com/georgia/rural-hospitals-in-georgia-face-bigger-challenges-in-covid-19-response/article_d1c36b02-696b-11ea-b5fd-97a73331a234.html [https://perma.cc/5DU7-PLTX].

19. Rebecca Klar, *Hospital CEO: \$7 Being Charged for 58-Cent Masks*, THE HILL (Mar. 19, 2020, 10:14 AM), <https://thehill.com/policy/healthcare/488408-hospital-ceo-7-being-charged-for-58-cent-masks> [https://perma.cc/N6QJ-GTSP].

20. Amanda C. Coyne & Maya T. Prabhu, *Georgia Legislature Suspending Session Indefinitely Amid Coronavirus*, ATLANTA J.-CONST. (Mar. 12, 2020), <https://www.ajc.com/news/state-regional-govt-politics/georgia-leaders-suspend-legislative-session-amid-coronavirus/ADuMnJWxEfYvI9YDvFxfTN/> [https://perma.cc/D96E-3SCC]; Letter from Geoff Duncan, Speaker of the House of Representatives, and David Ralston, Lieutenant Governor, to Members of the Georgia Gen. Assemb. (Mar. 13, 2020) (on file with the Georgia State University Law Review) (suspending the legislative session indefinitely); Letter from Geoff Duncan, Speaker of the House of Representatives, and David Ralston, Lieutenant Governor, to Members of the Georgia Gen. Assemb. (June 3, 2020) (on file with the Georgia State University Law Review) (announcing that the legislative session would resume in June).

21. Greg Bluestein & Maya T. Prabhu, *Georgia Lawmakers Grant Kemp Vast New Powers to Combat Coronavirus*, ATLANTA J.-CONST. (Mar. 16, 2020), <https://www.ajc.com/blog/politics/georgia-lawmakers-poised-give-kemp-new-powers-combat-coronavirus/IBjcf2rXIGecEI1SpFhesK/> [https://perma.cc/6FPV-T3HB].

22. Greg Bluestein, *Kemp Declares Public Health Emergency; 66 Coronavirus Cases in Ga.*, ATLANTA J.-CONST. (Mar. 15, 2020), <https://www.ajc.com/news/state-regional-govt-politics/kemp-declares-unprecedented-public-health-emergency-georgia/gdTeQfD6zJPb1kbYIRLHRO/> [https://perma.cc/W992-XE87]; Greg Bluestein, *Kemp Orders Public K-12 Schools, Colleges in Georgia Closed Through End of March*, ATLANTA J.-CONST. (Mar. 17, 2020), <https://www.ajc.com/news/state-regional-govt-politics/kemp-orders-all-public-schools-georgia-closed-through-end-march/Alpzcxd6xN8f2TGySOyzM/> [https://perma.cc/2SCZ-T2A3].

23. Ga. Exec. Order No. 04.14.20.01 (Apr. 14, 2020) (on file with the Georgia State University Law Review).

In the event of a Public Health State of Emergency, under Code section 38-3-51 the “Governor may declare that a state of emergency or disaster exists.”²⁴ Under a state of emergency, many new powers vest in the Governor to execute proper actions and precautions to protect the health and safety of Georgia citizens; the powers under Code section 35-3-51(c) exist for the period of the state of emergency.²⁵ The Governor may “perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.”²⁶ In addition, the Governor may “[s]uspend any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.”²⁷

Faced with a flood of volunteer and retired healthcare professionals, and in light of the necessary flexibility during the COVID-19 surge, healthcare institutions and facilities needed critical assistance and care from the State of Georgia during this unprecedented emergency.²⁸ Code section 38-3-35 provides immunity from liability of agencies and emergency management workers.²⁹ Under Code section 38-3-35(a), “[n]either the state nor . . . the agents . . . of the state . . . shall be liable for personal injury or property damage sustained by . . . a volunteer emergency management worker or member of any agency engaged in emergency management activity.”³⁰ Except in cases of “willful misconduct, gross negligence, or bad faith,” the Code section exempts from liability for injury or death both “employees, agents, or representatives of the state” and “volunteer[s] or auxiliary emergency management worker[s] or member[s] of any agency engaged in any

24. O.C.G.A. § 38-3-51 (2012 & Supp. 2020).

25. § 38-3-51(c).

26. § 38-3-51(c)(4).

27. § 38-3-51(d)(1).

28. Ga. Exec. Order No. 04.14.20.01, *supra* note 23.

29. O.C.G.A. § 38-3-35 (2012 & Supp. 2020).

30. § 38-3-35(a).

emergency management activity complying with or *reasonably attempting to comply*” with the statutory requirements.³¹

The Executive Order deemed employees, staff, and contractors of healthcare institutions and medical facilities auxiliary emergency management workers where services were provided or performed during the Public Health State of Emergency.³² The Order further deemed the services provided or performed by healthcare institutions and medical facilities constituted emergency management activities.³³

Get-Out-of-Jail-Free-Card

In the midst of a crisis not seen since 1918, Congress passed the Coronavirus, Relief, and Economic Security (CARES) Act, which President Trump signed into law on March 27, 2020.³⁴ A provision of the Act, section 3215, provided healthcare professionals with a form of relief from potential legal liability from medical malpractice claims.³⁵ This provision only applies to *volunteer* health care professionals, however.³⁶ The medical community answered the call from governors across the United States in response to the COVID-19 outbreak: “There is . . . no medicine to provide a simple cure. There are not enough tests. There is not enough personal protective equipment for medical personnel. There are not enough ventilators, hospital beds, and staff to handle the mounting crisis.”³⁷ In light of the crisis, field hospitals popped up across the nation; the President deployed the Naval hospital ship, the USNS Comfort; and elective surgeries and procedures were postponed to increase the

31. § 38-3-35(b) (emphasis added).

32. Ga. Exec. Order No. 04.14.20.01, *supra* note 23, at 2. The Order referenced the Georgia Code to provide more detailed definitions of specific terms applicable to the scope of the Order. *See* O.C.G.A. § 31-7-1(4)(A), (4)(C)–(G), (5) (2019 & Supp. 2020).

33. Ga. Exec. Order No. 04.14.20.01, *supra* note 23, at 2.

34. 15 U.S.C.A. § 9001.

35. Coronavirus Aid, Relief, and Economic Stability Act, Pub. L. No. 116-136, § 3215, 134 Stat. 281, 374 (2020) (to be codified at 15 U.S.C. §§ 9001–80).

36. *Id.*

37. Peter Kolbert & Caryn Lilling, *New York Leads the Way In Providing Liability Protections to Health Care Workers*, LAW.COM (Apr. 10, 2020, 11:30 AM), <https://www.law.com/newyorklawjournal/2020/04/10/new-york-leads-the-way-in-providing-liability-protections-to-health-care-workers/> [https://perma.cc/4KY6-BA3M].

number of available beds for COVID-19 victims.³⁸ Georgia, specifically, set up a “200-bed temporary hospital in an Atlanta convention center and, with the help of FEMA, dispatched four mobile units of about [twenty-two] beds each to different corners of the state.”³⁹

Following the lead of other states and Congress, in an effort to provide healthcare facilities additional flexibility, Governor Kemp issued Executive Order 04.14.20.01 to protect healthcare workers fighting on the front lines against COVID-19.⁴⁰ The Order attempted to encourage health-trained individuals to join the fight against COVID-19 by reducing legal exposure for regular providers and authorized healthcare personnel.⁴¹

Critics argue that the Order is a backdoor to a failed tort reform effort.⁴² Governor Kemp reassures that this is not the case:

As healthcare facilities battle COVID-19 in communities across Georgia, they face incredible challenges. Healthcare workers are making personal sacrifices to provide critical care to patients in need and save lives. These Georgians—some coming out of retirement or reentering the workforce

38. *Id.*

39. Liz Essley Whyte, *As Georgia Lifts Restrictions, Its Hospitals May Be Unready for a COVID-19 Surge*, NPR (May 12, 2020, 2:21 PM), <https://www.npr.org/sections/health-shots/2020/05/12/854671686/as-georgia-lifts-restrictions-its-hospitals-are-not-ready-for-a-covid-19-surge> [https://perma.cc/HZ4U-SXZC].

40. Arnall Golden Gregory LLP, *Georgia Order Limits Liability of Healthcare Institution Staff During COVID-19 State of Emergency*, JD SUPRA (Apr. 16, 2020), <https://www.jdsupra.com/legalnews/georgia-order-limits-liability-of-29703/> [https://perma.cc/EEZ4-C4RS].

41. Press Release, Brian P. Kemp, Gov. of Georgia, Gov. Kemp Issues New Executive Orders, Provides COVID-19 Update (Mar. 23, 2020), <https://gov.georgia.gov/press-releases/2020-03-23/gov-kemp-issues-new-executive-orders-provides-covid-19-update> [https://perma.cc/5KPA-HFQG].

42. Chris Joyner & Sarah Kallis, *Gov. Kemp Limits Legal Liability of Hospitals, Staff During Pandemic*, GA. WATCH (Apr. 17, 2020), <https://georgiawatch.org/gov-kemp-limits-legal-liability-of-hospitals-staff-during-pandemic/> [https://perma.cc/MT3W-49CJ] (“The Georgia medical industry consistently pushes state lawmakers to put new limits on patient lawsuits. This year, a push to massively reform the system died when enough Republican lawmakers joined with Democrats to quash it in the State Senate.”). Additionally, the focus should be on supporting healthcare workers confronting the COVID-19 pandemic and should not be used as a backdoor to circumvent that debate. *Id.* (quoting Georgia Watch Executive Director Liz Coyle).

just to lend a helping hand—are true heroes among us. I’m proud to support them.⁴³

However, critics think the Order is too broad because it covers all types of malpractice and are concerned that institutions will “claim immunity for existing deficiencies in care that are unrelated to the pandemic.”⁴⁴ Proponents of the Order, including the Georgia Health Care Association (GHCA), feel the crisis forces the industry to adopt a new standard of care, which the Order articulates clearly.⁴⁵

Analysis

The following section analyzes Executive Order 04.14.20.01, Designation of Auxiliary Emergency Management Workers and Emergency Management Activities.⁴⁶

Unintended Consequences

Georgia followed suit of other states when Governor Brian Kemp (R) issued Executive Order 04.14.20.01 to protect healthcare workers fighting on the front line against COVID-19.⁴⁷ Though the Order limits legal exposure for regular providers, authorized healthcare personnel, and healthcare volunteers, the Order does not limit legal immunity to issues related to COVID-19.⁴⁸ Notably, however, the Order extends protections for all “services provided or performed” by healthcare institutions and medical facilities during the Public Health State of Emergency.⁴⁹ Some critics argue that the Order is so broad

43. *Id.* (quoting Governor Kemp).

44. *Id.* Bill Holbert, an Atlanta attorney, expressed concern about the legality of the orders, calling them a “get-out-of-jail-free card” that essentially provides the institutions with “blanket immunity for services they are already being paid for.” *Id.* (quoting Bill Holbert).

45. *Id.* (quoting GHCA President Tony Marshall). Tony Marshall observed that the Order “effectively recognizes that the normal standards of care have to be deviated from in this crisis.” *Id.* (“Without that you would automatically lose every lawsuit.”).

46. Ga. Exec. Order No. 04.14.20.01, *supra* note 23.

47. Arnall Golden Gregory LLP, *supra* note 40.

48. *Id.*; Ga. Exec. Order No. 04.14.20.01, *supra* note 23, at 2.

49. Arnall Golden Gregory LLP, *supra* note 40.

that it will cover *all* types of malpractice.⁵⁰ This issue could cause possible oversights in industries like nursing homes that have a “troubling track record” if legal immunity is not limited to COVID-19-related issues.⁵¹

Other states have avoided similar pushback. “New York, New Jersey and Illinois have passed similar immunity measures, but they are generally tailored for medical care explicitly related to the pandemic.”⁵² The Illinois Executive Order provided that healthcare facilities, professionals, and volunteers who provided services *in response* to the COVID-19 outbreak maintain immunity from civil liability.⁵³ This provision differs from Georgia’s Executive Order, which limited civil liability exposure for employees, staff, and contractors of healthcare institutions and medical facilities for services provided during the Public Health State of Emergency. Thus, the Illinois Executive Order ensures that industries already under a watchful regulatory eye will remain so when providing services unrelated to the COVID-19 pandemic and will not escape their responsibilities with a blanket get-out-of-jail-free card in disguise of an Executive Order.

New York’s Executive Order provided that medical professionals “shall be immune from civil liability for any injury or death alleged to have been sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in support of the *State’s response* to the COVID-19 outbreak”⁵⁴

50. Joyner & Kallis, *supra* note 42.

51. *Id.*; Suzy Khimm et al., *More than 2,200 Coronavirus Deaths in Nursing Homes, but Federal Government Isn’t Tracking Them*, NBC NEWS (Apr. 10, 2020, 4:07 PM), <https://www.nbcnews.com/news/us-news/more-2-200-coronavirus-deaths-nursing-homes-federal-government-isn-n1181026> [<https://perma.cc/5VG9-ZSZX>].

52. Joyner & Kallis, *supra* note 42; N.Y. Exec. Order No. 202.01 (Mar. 7, 2020) (on file with the Georgia State University Law Review); Conn. Exec. Order No. 7U (Mar. 10, 2020) (on file with the Georgia State University Law Review); Ill. Exec. Order No. 17 (Mar. 28, 2020) (on file with the Georgia State University Law Review); N.C. Exec. Order No. 130 (Apr. 8, 2020) (on file with the Georgia State University Law Review); Interview with Michael Prieto, Partner, Prieto Marigliano Holbert Prieto, LLC (May 29, 2020) (on file with the Georgia State University Law Review) [hereinafter Prieto Interview] (stating gross negligence is almost an impossible standard to prove, leaving a plaintiff’s chance to recover from a claim that arose during the time covered by the Executive Order almost impossible).

53. Arnall Golden Gregory LLP, *supra* note 40 (emphasis added); Ill. Exec. Order No. 17, *supra* note 52; Ga. Exec. Order No. 04.14.20.01, *supra* note 23, at 2.

54. N.Y. Exec. Order No. 202.01, *supra* note 52 (emphasis added).

Another state Governor deemed it important to qualify the Executive Order's limitation of liability to services provided *in response* to the pandemic. Georgia's Order differs from New York's Order in the same way that it differs from Illinois's Order.

North Carolina's Executive Order went a step further by limiting liability for healthcare workers responding to COVID-19.⁵⁵ It extended the statute establishing limited liability for "emergency management workers," to healthcare workers "providing health care services to patients *affected* by COVID-19."⁵⁶ Again, North Carolina deemed it appropriate to insert "affected" to limit its get-out-of-jail-free card to healthcare workers, unlike Georgia. Georgia failed to foresee the issue arising from providing blanket immunity that could result in serious litigation in the future.

Impact

Governor Kemp's broad expansion of an "auxiliary emergency management worker" includes most medical providers that citizens have interacted with during the Public Health State of Emergency.⁵⁷ Code section 38-3-35(b) limits the liability of auxiliary emergency management workers that *reasonably* comply with the statute, except in cases of gross negligence, willful misconduct, or bad faith.⁵⁸ The Executive Order does not limit the expansion to claims that deal specifically with COVID-19 but instead provides a shield to any claim from services provided or performed by auxiliary emergency management workers during the Public Health State of Emergency.⁵⁹

Proponents of the Order stress that the COVID-19 crisis has required many in the medical industry to adopt a new standard of care that deviates from the established norm.⁶⁰ Because of how drastically practices in the industry have changed, proponents argue that the Order is necessary.⁶¹ Critics, however, argue the exact

55. Arnall Golden Gregory LLP, *supra* note 40.

56. *Id.*; N.C. Exec. Order No. 130, *supra* note 52.

57. Arnall Golden Gregory LLP, *supra* note 40.

58. O.C.G.A. § 38-3-51 (2012 & Supp. 2020).

59. Arnall Golden Gregory LLP, *supra* note 40.

60. Joyner & Kallis, *supra* note 42.

61. *Id.*

opposite—that the Order is unnecessary because the “reasonable” standard of care would already apply during the Public Health State of Emergency.⁶² Critics point out that medical entities and personnel could have been found liable for malpractice in non-COVID-19-related contexts during the pandemic, but the Order eliminates that possibility.⁶³

Power to Suspend Regulatory Schemes

Governor Kemp’s power is well-established; the Supreme Court has held that states maintain the power to protect the public health and welfare.⁶⁴ In *Jacobson v. Massachusetts*, the Supreme Court granted states and their Governors broad powers to enact reasonable regulations to protect public health and safety.⁶⁵ In *Jacobson*, the Supreme Court wrote that:

Although this court has refrained from any attempt to define the limits of [the Tenth Amendment’s] power, . . . it has distinctly recognized the authority of a state to enact quarantine laws and “health laws of every description” According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.⁶⁶

62. Prieto Interview, *supra* note 52.

63. Interview with Bill Holbert, Partner, Prieto Marigliano Holbert Prieto, LLC (May 29, 2020) (on file with the Georgia State University Law Review) (“Last year, *The Atlanta Journal-Constitution* published an investigation detailing neglectful and unsafe conditions at personal care homes across the state. I fear institutions will claim immunity for existing deficiencies in care that are unrelated to the pandemic.”); Prieto Interview, *supra* note 52 (opposing the Executive Order and emphasizing the irony of what the Order says about Georgia’s justice system; explaining the government says it trusts juries in criminal cases to make a determination as to whether someone should live or die, yet it does not trust that same jury to make a determination as to whether a medical provider acted reasonably within the appropriate standard of care).

64. *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905); *see also* U.S. CONST. amend. X.

65. *Jacobson*, 197 U.S. at 25; Maggie Davis et al., *Calling Their Own Shots: Governors’ Emergency Declarations During the COVID-19 Pandemic*, 12 CONLAWNOW 95, 95 (2020).

66. *Jacobson*, 197 U.S. at 25.

The Court in *Jacobson* established that states maintain the authority to enact public health laws, and the Second Circuit affirmed this principle more than a century later.⁶⁷ In *Phillips v. City of New York*, the Second Circuit relied on the Supreme Court's precedent in *Jacobson* to dismiss the constitutional claims of parents that opposed state-mandated vaccination.⁶⁸ In addition, the U.S. Supreme Court has held that states maintain the authority to create laws protecting the health of the public.⁶⁹

Under Code section 38-3-51, Governor Kemp may “[s]uspend any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster.”⁷⁰ However, this power is limited in that it only exists for the period of the state of emergency.⁷¹

Governor Kemp's Actions Are Protected

States' and Governors' powers have been challenged as the pandemic progressed, and some of these challenges have been met with success.⁷² The Wisconsin Supreme Court recently declared that the extended stay-at-home Order issued by the state's Secretary of Health was unenforceable.⁷³ Importantly, the court pointed out that the case was “not about Governor Tony Evers's Emergency Order or the powers of the Governor.”⁷⁴ In *Wolf v. Scarnati*, the Pennsylvania Supreme Court upheld Governor Tom Wolf's (D) ability to maintain

67. *Id.*; *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015).

68. *Phillips*, 775 F.3d at 542 (citing *Jacobson*, 197 U.S. at 25–27, 37–38).

69. *New York v. United States*, 505 U.S. 144, 157 (1992).

70. O.C.G.A. § 38-3-51(d)(1) (2012 & Supp. 2020).

71. § 38-3-51(c).

72. *See, e.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020) (denying motion for a temporary stay against Illinois Governor J. B. Pritzker's (D) Executive Order 2020-332, the State's stay-at-home Order); *Power v. Leon Cnty.*, No. 2020 CA 001200, 2020 WL 3468349 (Fla. Cir. Ct. 2020) (denying motion to enjoin county's mask ordinance). *But see, e.g.*, *Bailey v. Pritzker*, No. 3:20-cv-474-GCS, 2020 WL 3498428 (S.D. Ill. 2020) (granting restraining order against Governor Pritzker's 30-day extension of the State's stay-at-home Order).

73. *Wisconsin Legislature v. Palm*, 942 N.W.2d 900, 905 (Wis. 2020); Davis et al., *supra* note 65, at 100.

74. *Wisconsin Legislature*, 942 N.W.2d at 905.

COVID-19 shutdown Orders.⁷⁵ After Governor Wolf renewed the state's emergency disaster proclamation, the Pennsylvania General Assembly adopted a concurrent resolution to terminate the disaster emergency but did not present the resolution to the Governor.⁷⁶ The Pennsylvania Supreme Court held that the resolution was a legal nullity because it was not presented to the Governor for approval or veto and stated: "The Pennsylvania Constitution does not empower the legislature to act unilaterally to suspend a law, and the Governor's purported suspension of law did not violate the non-delegation doctrine."⁷⁷

These challenges will largely depend on the balancing test articulated in *Jacobson*, weighing the state's interest in the public health emergency against the alleged intrusion on civil liberties.⁷⁸ Governor Kemp's Executive Orders had not been challenged as of October 1, 2020. However, Governor Kemp did sue Atlanta Mayor Keisha Lance Bottoms (D) and members of the Atlanta City Council to invalidate and enjoin enforcement of mask mandates.⁷⁹ Governor Kemp argued that Atlanta "may only exercise the powers delegated to it by the state[] and Mayor Bottoms's attempts to exercise an undelegated power against the state" were beyond her legal authority.⁸⁰ In addition, Governor Kemp claimed Georgia law provides the Governor with "the power to suspend municipal orders that are contradictory to any state law or to his executive orders."⁸¹ The Georgia Municipal Association (GMA) filed an amicus brief in opposition to the Governor, arguing that Georgia's Constitution allows local governments to form their own legislation and that Mayor Bottoms's mandatory mask Order does just that.⁸²

75. *Wolf v. Scarnati*, 233 A.3d 679, 707 (Pa. 2020).

76. *Id.* at 685.

77. *Id.* at 707.

78. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); Davis et al., *supra* note 65, at 100–01.

79. Complaint for Declaratory and Injunctive Relief at 10–15, *Kemp v. Bottoms*, No. 2020CV338387, 2020 WL 4036827 (Ga. Super. Ct. July 16, 2020) [hereinafter *Mask Mandate Complaint*].

80. *Id.*; *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic*, 2020, BALLOTPEDIA [hereinafter *Lawsuits State Action*], [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020) [https://perma.cc/RHV5-9BZ6].

81. *Mask Mandate Complaint*, *supra* note 79, at 5; *Lawsuits State Actions*, *supra* note 80.

82. Jim Galloway et al., *The Jolt: Governor Kemp's Lawsuit Would Overturn Mask Requirements in*

Governor Kemp's powers, if challenged, would likely be protected under the *Jacobson* balancing test because they are more similar to those at issue in *Wolf* than in *Wisconsin Legislature*. Executive Order 04.14.20.01 related directly to his authority to enact such Orders as provided in Code section 38-3-51. Thus, Governor Kemp's authority to enact the Order would be the center of any lawsuit challenging the Order, unlike in *Wisconsin Legislature* where the court analyzed the enforceability of an extended stay-at-home Order issued by the state Secretary of Health rather than an Executive Order issued by the Governor. Governor Kemp's powers will be protected under *Jacobson* because Georgia has a sufficient interest in protecting its citizens' health with the continuing number of COVID-19 cases. In addition, Governor Kemp's authority will be protected, just as Governor Wolf's powers were protected in *Wolf*, because the Georgia legislature cannot unilaterally suspend a law.

Public Policy

Critics argue that the Order is really a backdoor effort to the failed tort reform act that was quashed in the State Senate earlier this year.⁸³ The "Georgia medical industry consistently pushes state lawmakers to put new limits on patient lawsuits," and the Georgia Hospital Association seemed to hold the upper hand in its massive lobbying efforts to the Governor's office to get the Order issued.⁸⁴ Senator Steve Gooch (R), the bill's lead sponsor, said the bill is necessary to keep jury awards and insurance premiums down so that Georgia will continue to be business-friendly.⁸⁵

100 *Georgia Cities, Brief Says*, ATLANTA J.-CONST. (July 22, 2020), <https://www.ajc.com/politics/politics-blog/the-jolt-governor-kemps-lawsuit-would-overturn-mask-requirements-in-100-georgia-cities-brief-says/RLYLTDW5GGFDBSSTQOUKZL4I/> [https://perma.cc/KL23-WXJU]. The Georgia Municipal Association's (GMA) argued that "[t]he Georgia General Assembly . . . intended for local governments to have the ability to enhance guidance from the Governor through supplementation, so long as the supplementation by the local governments is consistent with the Governor's executive orders." *Id.* The GMA's brief continues: "If the goal of the Plaintiff's repeated executive orders strongly encouraging the usage of masks was to increase the usage of such, then it is a reasonable reading that mandating usage of such would help achieve that goal." *Id.*

83. Joyner & Kallis, *supra* note 42.

84. *Id.*

85. Bill Rankin, *It's Business and Insurers vs. Trial Lawyers in Fight over Torts Bill*, ATLANTA J.-CONST. (Feb. 27, 2020), <https://www.ajc.com/news/local/business-and-insurers-trial-lawyers-fight->

Sponsors said more changes were needed to “stop runaway jury verdicts and correctly apportion blame when someone is injured and sues for compensation.”⁸⁶ On the other side, opponents of the bill “call[ed] the legislation an assault on the U.S. Constitution’s guarantee of a citizen’s right to a trial by jury.”⁸⁷ Senator Gooch countered and said the “reputation of Georgia’s civil justice system [was] being called into question . . . [and the] system [needed to] change if Georgia was going to continue to be a good place to do business and live.”⁸⁸ However, the bill was ultimately quashed. These same concerns can be construed as the underlying backbone to the pressures prompting the Governor’s signature of the Order as an alternative to the failed tort reform bill.

The legislature reconvened on June 15. Late into the session, legislators introduced and ultimately passed Senate Bill (SB) 359, also known as the Georgia COVID-19 Pandemic Business Safety Act.⁸⁹ This bill “provide[d] substantial liability limitation to businesses against tort claims arising from the COVID-19 pandemic,” similar to the Order.⁹⁰ The bill originated when hospital and healthcare providers requested immunity; legislators later broadened it to include sports venues and ultimately businesses.⁹¹ The “limitation” of liability covered any healthcare provider and any other “entity” for any “COVID-19 liability claim.”⁹² The bill also

over-tort-bills/fE3Z6hH3b8COrc1q9fhi4N/ [https://perma.cc/UEG5-TMM9]; Bill Rankin & Maya T. Prabhu, *Tort Legislation Stalls in Georgia Senate*, ATLANTA J.-CONST. (Mar. 10, 2020), <https://www.ajc.com/news/local/tort-legislation-stalls-georgia-senate/YJ2baxvIKYvAm7YEHsYv5O/> [https://perma.cc/4VRN-7LHW].

86. Rankin, *supra* note 85.

87. *Id.* (quoting Georgia Association of Trial Lawyers President Dan Snipes) (“‘Georgia has a very fair and balanced court system,’ Snipes said. ‘This bill is a sweeping overthrow of our judiciary that benefits insurance companies and big business at the expense of our citizens who have been harmed by the negligence of others.’”).

88. *Id.* (quoting Senator Steve Gooch) (“The Washington-based American Tort Reform Association recently ranked Georgia sixth on its top-10 list of the nation’s ‘Judicial Hellholes.’ Georgia, its annual report said, is a state where ‘outrageous nuclear verdicts have become the norm.’”).

89. O.C.G.A. §§ 51-16-1–5 (Supp. 2020); *see also Georgia Legislature Approves Liability Limitation in COVID-19 Pandemic Business Safety Act*, NELSON MULLINS (July 7, 2020) [hereinafter *Pandemic Business Safety Act*],

https://www.nelsonmullins.com/idea_exchange/alerts/gold_dome/all/georgia-legislature-approves-liability-limitation-in-covid-19-pandemic-business-safety-act [https://perma.cc/HE97-MLYR].

90. *Pandemic Business Safety Act*, *supra* note 89; *see also* §§ 51-16-1–5.

91. *Pandemic Business Safety Act*, *supra* note 89; *see also* §§ 51-16-1–5.

92. *Pandemic Business Safety Act*, *supra* note 89; *see also* §§ 51-16-1–5.

included a rebuttable presumption that a customer or patient assumes the risk of infection if the business makes specific efforts to warn the customer or patient.⁹³ The liability limitation covered causes of action that accrue through July 14, 2021.⁹⁴ This bill mirrored the same underlying concerns of both the failed tort reform act (that would have made Georgia more business-friendly) and the Order (that provided blanket immunity).⁹⁵

Conclusion

Georgia reported its first COVID-19 case on March 2, 2020, and soon after reported its first death due to COVID-19 on March 12.⁹⁶ Faced with a flood of COVID-19 patients, healthcare facilities in Georgia needed critical assistance and care from volunteer and retired healthcare professionals during this unprecedented emergency.⁹⁷ Following the lead of other states and Congress—in an effort to provide healthcare facilities additional flexibility—Governor Brian Kemp (R) issued the Executive Order 04.14.20.01 to protect healthcare workers fighting on the front lines against COVID-19.⁹⁸ The Order attempted to encourage health-trained individuals to join the fight against COVID-19 by reducing legal exposure for regular providers and authorized healthcare personnel.⁹⁹

However, the Order failed to limit liability to COVID-19-related measures, unlike Executive Orders of other states, which could have great consequences in litigation in the future. Specifically, the Order used the term “reasonable” in relation to how healthcare volunteers and others work, without clearly defining the term. Critics of the Order also argued that it could be disguised as an attempt to institute the failed tort reform act. Ultimately, the Order addressed the need to

93. *Pandemic Business Safety Act*, *supra* note 89; *see also* §§ 51-16-1–5.

94. *Pandemic Business Safety Act*, *supra* note 89; *see also* §§ 51-16-1–5.

95. Patrick L. Grp., LLC, *Georgia COVID-19 Pandemic Business Safety Act*, JD SUPRA (July 7, 2020), <https://www.jdsupra.com/legalnews/georgia-covid-19-pandemic-business-49830/> [https://perma.cc/Y6PD-6URY].

96. *Georgia Overall COVID-19 Status*, *supra* note 16.

97. Ga. Exec. Order No. 04.14.20.01, *supra* note 23.

98. Arnall Golden Gregory LLP, *supra* note 40.

99. Press Release, *supra* note 41.

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protect Georgians who answered the call to provide healthcare services during the unprecedented COVID-19 pandemic.

Angelena Velaj & Troy Viger

